INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	7
Argument:	
I. The United States is not liable to pay compensation for petitioner's timber because it was removed under valid exercise of Louisiana's riparian servitude for levees, to which the timber had always been subject	8
A. The timber was subject to the riparian servitude without compensation	11
B. The servitude was correctly exercised by the Levee Board without oppression and injustice or denial of due process of law	15
II. If there is liability, the United States is entitled to recover over from the Levee Board	27
Conclusion	29
Appendix	30

CITATIONS

Cases:

Adirondack Railway v. *New York State*, 176 U. S. 335	25
Bass v. *State*, 34 La. Ann. 494	12
Board of Com'rs v. *Trouille*, 212 La. 152, 31 So. 2d 700	25
Board of Com'rs of Tensas Basin Levee District v. *Franklin*, 219 La. 859, 54 So. 2d 125, appeal dismissed, 342 U. S. 844	11, 22, 26

378246—56——1

Cases—Continued

	Page
Board of Levee Com'rs v. *Kelly*, 225 La. 411, 73 So. 2d 301	26
Bragg v. *Weaver*, 251 U. S. 57	25
Danziger v. *United States*, 93 F. Supp. 70	19, 23, 24, 27
Dickson v. *Board of Com'rs of Caddo Levee District*, 210 La. 121, 26 So. 2d 474	11, 24, 25–26
Eldridge v. *Trezevant*, 160 U. S. 452	11, 22
Fletcher v. *Nineteenth Louisiana Levee Dist.*, 165 So. 495	15
Hanson v. *City Council of LaFayette*, 18 La. 295	
Hart v. *Board of Levee Com'rs*, 54 Fed. 559	11, 21
Joslin Co. v. *Providence*, 262 U. S. 668	25
Lacour v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636	14, 15
Mayer v. *Board of Com'rs for Caddo Levee Dist.*, 177 La. 1119, 150 So. 295	13
Mayor of Vidalia v. *McNeely*, 274 U. S. 676	11
Old Dominion Co. v. *United States*, 269 U. S. 55	20, 25
Peart v. *Meeker*, 45 La. Ann. 421, 12 So. 490	11, 21
Police Jury of West Baton Rouge v. *Bozeman*, 11 La. Ann. 94	12
Pruyn v. *Nelson Bros.*, 180 La. 760, 157 So. 585	19, 23
Pulley & Erwin v. *Municipality No. 2*, 18 La. 278	12
Rindge Co. v. *Los Angeles*, 262 U. S. 700	25
Scott v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429	16
Tilden v. *United States*, 10 F. Supp. 377	26
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	19
United States v. *San Geronimo Development Co.*, 154 F. 2d 78, certiorari denied, 329 U. S. 718	20
United States v. *40.75 Acres of Land in DuPage County, Ill.*, 76 F. Supp. 239	20
United States ex rel. T. V. A. v. *Welch*, 327 U. S. 546	25
Ward v. *Board of Levee Com'rs*, 152 La. 158, 92 So. 769	14
Weeks v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491	14, 15
Wolfe v. *Hurley*, 46 F. 2d 515, affirmed *per curiam*, 283 U. S. 801	11, 12, 22–23

Federal Statutes: Page

Federal Flood Control Act of May 15, 1928, Section 3, 45 Stat. 534, 535, 33 U. S. C. 702c ... 16

Federal Flood Control Act of May 15, 1928, as amended, 55 Stat. 642, 33 U. S. C. 702a, *et seq.* ... 3

Tucker Act, 28 U. S. C. 1346 (a) (2) ... 2

33 U. S. C. 701c ... 16, 29

33 U. S. C. 702a–9 ... 16, 29

33 U. S. C. 702a–12 (d) ... 5, 28

33 U. S. C. 702a–12 (e) ... 16, 29

33 U. S. C. 702c ... 3, 29

33 U. S. C. 702d ... 26

Louisiana Constitution and Statutes:

Louisiana Constitution of 1921, Article 16:

Section 5 ... 16

Section 6 ... 12, 13

Louisiana Civil Code:

Article 455 ... 11

Article 465 ... 15, 30

Article 665 ... 11

Article 861 ... 24, 30

Louisiana Statutes:

Act No. 75, Acts of 1940, La. Rev. Stats. 52:2 ... 16, 31

Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3 ... 16, 31

Act No. 188, Acts of 1904, La. Rev. Stats. 9:1103 ... 15

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion (R. 262–284) are reported at 224 F. 2d 7. The opinion of the district court denying the Government's motion to dismiss (R. 30–33) is reported at 94 F. Supp. 441. The court's opinion after the first trial (R. 229–242) is reported at 107 F. Supp. 981. The final opinion following a new trial (R. 246–255) is reported at 119 F. Supp. 749.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1955 (R. 285). A petition

for rehearing was denied on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and was granted on November 7, 1955 (R. 291). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable for the value of timber which it cleared from a right of way in enlarging a levee along the Mississippi River, where the right of way had been donated to the United States by a Louisiana Levee Board after it had exercised the state's servitude to use such property without compensation, because (a) the Levee Board did not give notice and a hearing to the owner, or (b) because the timber was removed in a manner which precluded salvage in order to save substantial expense in the levee work.

STATUTES INVOLVED

The majority of the pertinent provisions of the state and federal statutes are set out in the Appendix to petitioner's brief, pp. 30–34. Other pertinent provisions of Louisiana law are printed in the Appendix to this brief, *infra*, pp. 30–32.

STATEMENT

Petitioner instituted these two suits under the Tucker Act, 28 U. S. C. 1346 (a)-(2), to recover the value of timber cleared from two tracts of land by contractors of the United States in the

enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber, growing on the batture between the old levee and the river, was removed. Petitioner owned the timber only. The two cases were consolidated for trial. The material facts are as follows:

The project was undertaken pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, as amended, 45 Stat. 534, 55 Stat. 642, 33 U. S. C. 702a, *et seq.* Section 3 of that Act (33 U. S. C. 702c, Pet. Br. App. 30) provides that before the United States shall expend funds for flood control on the lower Mississippi River the state shall "provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River." Acting under that provision, the Corps of Engineers, United States Army, submitted its plans for the enlargement of two levees to the Board of Commissioners of the Fifth Louisiana Levee District, which is the state agency charged with effectuating the foregoing provision in the area involved here, and requested the necessary rights of way (R. 295–296). The plans had been approved by the Louisiana Department of Public Works (R. 221, 223, 296). The President of the Levee Board replied by letter granting the requested rights of way and his action was subsequently approved by the Board (R. 297–298).

Such action by the Levee Board was taken for the purpose of exercising the right of the State of Louisiana to a servitude for levee purposes which that State has in all lands riparian to navigable rivers.

Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun (R. 83). When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's proposed salvaging operations would leave on the land (R. 185, 187, 204). Their contracts with the United States authorized pushing the trees over and out of the area (R. 203–204; Exhibits P-6, P-7).

Petitioner then instituted these actions against the United States to recover the value of the timber (R. 3, 48). The United States filed third party complaints bringing in the Levee Board as a defendant (R. 33, 56). It also moved to dismiss petitioner's complaints as not stating claims upon which relief could be granted, but this was denied (R. 27, 30, 54; 94 F. Supp. 441).

At the trial, the United States and the Levee Board contended that the timber was legally re-

movable without compensation to the owner, in the customary exercise of a servitude for levee purposes imposed by Louisiana law. The United States additionally contended that under certain provisions of state and federal law the Levee Board should be required to pay any compensation that might be awarded to the claimant.

The district court, sustaining petitioner's claim, held that the state's servitude was not effectively exercised since the Levee Board acted "without any notice or formal procedure whatever", and that the United States was therefore liable in civil trespass, but that it could recover over against the Levee Board because of the latter's obligation to furnish it with the necessary rights of way (R. 229–242; 107 F. Supp. 981). On motion for a new trial by the United States and the Levee Board, further proceedings were had after which the court held that the United States was liable under the Fifth Amendment to the United States Constitution, but that it could not recover from the Levee Board because of its failure to require an effective exercise of the servitude and because it "would be compelled" under Section 3 of the Federal Flood Control Act of May 15, 1928, as amended (55 Stat. 643, 33 U. S. C. 702a–12 (d), Pet. Br. App. 30), to "reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable * * * for future setbacks of main-line Mississippi River levees"

(R. 246–254; 119 F. Supp. 749). Accordingly, the court dismissed the suits as to the Levee Board and entered judgment for $10,801 against the United States, representing the market value of the timber (R. 256). Interest was allowed at four percent from the date of judgment to 30 days after approval of any appropriation act providing for payment.

The United States appealed on the merits and petitioner appealed for allowance of a larger interest award (R. 257, 258). The court of appeals, one judge dissenting, concluded that the United States was not liable and reversed with directions to enter judgment for the United States (R. 262–284; 224 F. 2d 7). It held that petitioner's timber was subject to the servitude of use by the state for levee purposes without compensation; that notice and a hearing were not prerequisite to an exercise by the state of a public right which it owned; and that, in this case, the servitude had been fully and validly exercised by the Levee Board for itself and for the United States.[1]

[1] Since the court of appeals held that the United States was not liable, it did not reach the interest question discussed by petitioner (Br. 26–29). Of course, if this Court should hold that there has been a taking of a property under the Fifth Amendment, the award should include compensation for delay in payment represented by interest from the date of taking. In view of its holding that the United States was not liable, the court of appeals also failed to reach the question whether the Levee Board was liable over to the United States.

SUMMARY OF ARGUMENT

I

A. From earliest times in Louisiana, property riparian to the Mississippi River has been subject to a servitude in the public for levee purposes. All private ownership in such property is subject to the servitude by its very title, and a purchaser takes "knowingly." The servitude is a property interest owned absolutely by the state so that no compensation is owed when it is exercised and used by the state. The servitude may extend miles distant from the river and includes all lands, improvements, growing crops, and standing timber which are within the reasonable necessity of the situation as produced by the forces of nature. Therefore, petitioner's growing trees, located on the batture between the levee and the river, were plainly within the servitude.

B. The Levee Board correctly exercised the servitude and donated the right of way to the United States in accordance with state and federal law. In Louisiana law, exercise of this servitude is an *appropriation*, which is use by the state of a property interest which it already owns. Such action is not an *expropriation*, which is the taking of property in which the state has no interest. No notice or hearing is necessary before an appropriation is made.

There was no unreasonable use of the servitude or oppression and injustice in prosecuting the

public work of levee construction in the most economical way.

II

If the United States is liable, it is entitled to recover over from the Levee Board because, by provisions of state and federal law and the transactions in this case, the Levee Board bound itself to provide the right of way free of cost to the United States. Hence, should the Court hold the Government liable, the case should be remanded to the court below for the purpose of determining whether the Levee Board is liable to indemnify the United States.

ARGUMENT

I

The United States is not liable to pay compensation for petitioner's timber because it was removed under valid exercise of Louisiana's riparian servitude for levees, to which the timber had always been subject

Petitioner contends that the decision of the court of appeals misconstrues the law of the State of Louisiana and denies due process. Both contentions are based on that court's holding that the state properly exercised the levee servitude historically attaching to riparian lands and appurtenances on navigable rivers in Louisiana, despite the fact that the state gave no notice of its action and the further fact that petitioner was given no opportunity to salvage the timber on the lands appropriated for levee purposes. But these contentions ignore the plain and constitu-

tional distinction in Louisiana law between an *appropriation*, which is a right in the state to use a property interest that it already owns, and an *expropriation*, which is the taking or using by the state of property in which it has no right or interest. The former leaves no constitutional obligation to compensate; the latter requires compensation.

In Louisiana, it is historical that the state owns absolutely a levee servitude on riparian lands on navigable rivers, and it has never agreed to compensate for the exercise of such a servitude on land in a batture area. The exercise of the servitude by the state in the instant case, for the purpose of transferring it to the United States for execution, was an appropriation. It was but the exercise of an absolute right of the state in land situated in the batture area, on which petitioner's timber stood, to use the land for levee purposes, and the destruction of the timber as part of the land, the removal of which was a *sine quo non* to the use of the land for levee purposes, was incidental to and a part of the action by the state in availing itself of the benefits of the servitude. The exercise of the servitude by the state required the taking of the soil and, *a fortiori*, encompassed the necessity of removing everything on the land, including timber, which interfered with that operation. In the circumstances, removal of the timber was necessary to the exercise of the state's ownership in the servitude. And

since the right to the servitude conferred by the state upon the United States was as broad as its own rights, the exercise by the United States of that servitude was no different from what it would have been had the state exercised the servitude itself. Consequently, the action of the United States in having the timber removed, by the most economical method feasible in the course of enlarging the levee, was no more than an appropriation. Since, under Louisiana law, the state would have been under no duty, either statutory or constitutional, to compensate, had it destroyed the timber while enlarging the levee itself, the United States, as the state's transferee, likewise was free of any duty to respond in compensation.

The levee servitude is unique to Louisiana and derives from the extreme threat of flood waters to vast areas in the state by reason of their low elevation at the end of the Mississippi Valley drainage system. Because of that threat, private rights in riparian lands have always been subject, by their very titles, to the exercise, without compensation, of the state's paramount ownership of the flood plain for levee purposes. Petitioner concedes the existence of that servitude in behalf of the state (Br. 12–13), but would surround its use with conditions limiting its force and effectiveness. Such limitations are inconsistent with the very nature and purpose of the servitude, and should not be recognized. The

conditions to the use of the servitude urged by petitioner have never before been required by Louisiana law or decision, and no valid basis has been presented which would warrant this Court in imposing them.

A. The timber was subject to the exercise of the riparian servitude without compensation

From earliest times in Louisiana, the owner of property bordering upon a navigable stream has been required to give, without compensation, so much thereof as might be needed for the construction of levees. *Wolfe* v. *Hurley,* 46 F. 2d 515 (W. D. La.), affirmed *per curiam,* 283 U. S. 801; *Peart* v. *Meeker,* 45 La. Ann. 421, 12 So. 490; Articles 455 and 665, Louisiana Civil Code (Pet. Br. App. 33). Such property "never passes free of this reservation to a purchaser" and the purchaser takes "knowingly." *Eldridge* v. *Trezevant,* 160 U. S. 452; *Mayor of Vidalia* v. *McNeely,* 274 U. S. 676, 684. Because of the broad flood plains in Louisiana, the servitude may extend "miles distant" from the river, and it includes all property "which is within range of the reasonable necessity of the situation as produced by the forces of nature." *Hart* v. *Board of Levee Com'rs,* 54 Fed. 559 (C. C. E. D. La.); *Dickson* v. *Board of Com'rs of Caddo Levee District,* 210 La. 121; 26 So. 2d 474; *Board of Com'rs of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 867, 54 So. 2d 125, appeal

dismissed, 342 U. S. 844, on authority of *Eldridge* v. *Trezevant, supra,* and *Wolfe* v. *Hurley, supra.*

Property owners must "accommodate themselves to the change, as much so as if such change had been occasioned by the sudden caving in of the banks of the river above." *Police Jury of West Baton Rouge* v. *Bozeman,* 11 La. Ann. 94. "Houses and works on land thus brought under such a servitude, must, like the land of which they form part, be yielded up to public service, without compensation, for their demolition is the act, not of man, but of God and the law." *Bass* v. *State,* 34 La. Ann. 494, 498. The taking of soil from the flood plain to enlarge a levee is within the servitude and the riparian proprietor "*cannot* deprive the public of that right of use at their pleasure, or *impose any but legal limitations on it.*" [Emphasis added.]. *Pulley & Erwin* v. *Municipality No. 2,* 18 La. 278, 284. "This rule, of course, antedates both the federal and state Constitutions, and was recognized as coexistent with those principles which were subsequently embraced in the written provisions of the Fifth Amendment to the Federal Constitution and the Bill of Rights, or what is now section 2 of article 1 of the state Constitution of 1921; hence the latter were adopted subject thereto." *Wolfe* v. *Hurley, supra,* at p. 520.

The right of free use of the servitude was relinquished in part by Article 16, Section 6, of

the Louisiana Constitution of 1921 (Pet. Br., App. 32). It provides that "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purpose * * * shall be paid for at a price not to exceed the assessed value for the preceding year; *provided that this shall not apply to batture* * * *." [Emphasis added.] As a source of funds for such payment, the constitution authorizes the Levee Districts to "levy, on all taxable property situated therein, a tax sufficient to pay for said property so taken, * * * not to exceed one-fourth of one mill on the dollar" and provides, further, that "This shall not prevent the appropriation of said property before payment." The nature and scope of the provision was explained in *Mayer* v. *Board of Com'rs for Caddo Levee Dist.*, 177 La. 1119, 1126, 150 So. 295, as follows:

> It appears, therefore, from the foregoing, that whatever section 6 of article 16 of the Constitution of 1921 may give to the owner of land, subject to the servitude for levee purposes, is *in the nature of a gratuity*. It is a payment made by the agency of the state—the levee district—*for what already belonged to the state* at the time of the adoption of the Constitution. The Constitutional Convention of 1921 was evidently prompted, in adopting the provision, to lessen, so far as the means of the public authorities would permit, the burden of the servitude resting on lands, border-

ing on navigable streams, and growing out of the necessities of the situation. *Care should be taken, therefore, not to carry the spirit of the provision beyond its clear intendment, and thereby render, perhaps, the state unable to discharge its duty of protecting a large part of the public from inundation.* [Emphasis added.]

Payment for batture was expressly excluded from the "gratuity" which that provision of the 1921 Louisiana Constitution allowed to be paid "for what already belonged to the state." Petitioner concedes that its timber was on batture (Pet. Br. 16–17).[2]

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[2] The court of appeals correctly defined "batture" as "that part of the river bed which is uncovered at the time of low water but is covered annually at the time of ordinary high water" (R. 266).

Petitioner's reference to "non-batture lands" (Pet. Br. 17) is without significance. The 1921 Constitution permits recovery only for property other than batture and limits that recovery to "a price not to exceed the assessed value for the preceding year." Petitioner did not allege in its complaint or show that either the lands on which the timber stood or the timber itself was assessed for the preceding year. When a right of action depends for its existence upon a statutory or constitutional grant, it cannot extend beyond the terms of the grant. *Ward* v. *Board of Levee Com'rs*, 152 La. 158, 92 So. 769. For that reason, the Louisiana courts have uniformly held that "it is necessary for the plaintiff, in a suit for compensation for property used or destroyed for levee purposes, to allege that the property was assessed for taxes in the preceding year, and to allege what the amount of the assessment was, for that is all that the plaintiff could have a right of action for." *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491.

The phrase "Lands and improvements thereon" used in the Louisiana Constitution to define the property subject to the servitude is plainly broad enough in terms to include growing trees. Moreover, Article 465, Louisiana Civil Code, *infra*, p. 30, specifically provides that: "Standing crops * * * and trees before they are cut down * * * are considered as part of the land to which they are attached." Act No. 188, Acts of 1904, La. Rev. Stats. 9:1103 (Pet. Br. App. 31) likewise provides: "Standing timber shall remain an immovable, and be subject to all the laws relative to immovables, even when separated in ownership from the land on which it stands." There is no recovery for standing crops which are destroyed in the construction of a levee. *Lacour* v. *Red River, Atchafalaya & Bayou Boeuf Levee Dist.*, 158 La. 737, 104 So. 636; *Weeks* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 491 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.). It follows that growing trees are equally within the servitude.

B. The servitude was correctly exercised by the Levee Board without oppression and injustice or denial of due process of law.

The Federal Flood Control Act of May 15, 1928, Sec. 3, 45 Stat. 534, 535–536, 33 U. S. C. 702c (Pet. Br. App. 30), requires "the States or levee dis-

(C. A. La.); *Fletcher* v. *Nineteenth Louisiana Levee Dist.*, 165 So. 495 (C. A. La.); *Scott* v. *Red River-Bayou Pierre Levee Dist.*, 7 So. 2d 429 (C. A. La.); *Dickson* v. *Board of Comrs of Caddo Levee District*, 210 La. 121, 26 So. 2d 474.

tricts" to give "assurances satisfactory to the Secretary of the Army that they will * * * (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."[3] Cf. 33 U. S. C. 701c, 702a–9, 702a–12 (e). By Article 16, Section 5, of the 1921 Louisiana Constitution (Pet. Br. App. 32), the Levee Districts are given authority "to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities." By Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, and Act No. 76, Acts of 1938, La. Gen. Stats. 6869.3, *infra*, pp. 31–32, the Levee Boards "may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with: * * * (3) Flood control works."

[3] The reference by petitioner (Pet. Br. 21), the district court (R. 254), and the dissent below (R. 281) to 33 U. S. C. 702a–12 (d), which provides for reimbursement of local authorities by the United States for expenditures "for future setbacks of main-line Mississippi River levees," is not applicable here. This is an enlargement of an existing levee, not a setback (R. 222–223). Also, the statement of the dissent below (R. 281), adopted by petitioner (Pet. Br. 21), to the effect that the Government's engineers testified that the United States pays for rights of way involved in the enlargement of levees is inaccurate. They testified to the contrary (R. 222–223).

In the present case, the Board of Commissioners for the Fifth Louisiana Levee District duly exercised the State's levee servitude and donated the necessary rights of way on this particular property to the United States, in the following manner. The Board had pledged itself by resolutions of May 15, 1929, and June 16, 1929, to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River" (R. 292–294). By resolution of September 12, 1945, the Board authorized its President "to grant rights of way where the need is immediate, the proper right-of-way resolution to be passed in the regular manner at the following Board meeting" (R. 297–298). By letters of May 19, 1947, and June 10, 1947, the District Engineer, Corps of Engineers, United States Army, advised the Levee Board of the proposed enlargement of the levee, *enclosed the plats which included this particular property*, and requested "a formal statement by your Board that rights-of-way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work. This statement may be in the form of a letter signed by the President of the Board" (R. 295–296). Referring to the requests for a "formal statement * * * that rights-of-way are available," the President of the Levee Board replied on June 12, 1947, that "The Board of Commissioners of

the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible" (R. 297). The granting of the rights of way was also approved by the Louisiana Department of Public Works (R. 221, 223, 296).

The Board ratified the action of its President at its meeting of July 9, 1947,[4] when the letter by the President was read and no objections were made. The minutes of the meeting show that the Board considered that the letter "compiled with" the request of the Engineers (R. 298). Subsequent actions and inactions of the Board, as evidenced by the correspondence between the Board and the Corps of Engineers, also show conclusively that the Board had authorized the use of the rights-of-way servitude on this property by the Corps of Engineers (R. 299–304). On the basis of this donation by the Levee Board, the United States, through its contractors, entered upon the property and removed the timber in the process of enlarging the levee.[5]

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[4] The dissent below acknowledged that: "July 9th a resolution was passed by the Levee Board * * *" (R. 272).

[5] In addition to the foregoing exercise of the servitude, it would seem that the servitude had already been exercised at the time of the construction of the original levee. Certainly, continuing use of the batture between the levee and the river as a source of soil to maintain and repair the levee was contemplated and the existence of the levee was notice, to all persons, of the continuing use of the servitude at this place.

Thus, the United States did not acquire or destroy the timber through the exercise of its sovereign power to take private property, but its action in removing the timber was incident to a valid transaction between it and the Levee Board.[8] As the court said in *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.), in dismissing a similar action: "It is clear from the evidence and the testimony that the Pontchartrain Levee District and not the United States of America appropriated the necessary rights of way in connection with the construction of Diamond Levee Setback. Consequently there is no basis for this action against the United States." The Board in this case exercised its servitude through the instrumentality of the Corps of Engineers. As was said in *Pruyn* v. *Nelson Bros.*, 180 La. 760, 769, 157 So. 585, "The customary way" for a Levee Board to exercise the servitude "is to delegate to the contractor the right to remove the soil from the batture." The Louisiana court further said in that case (180 La. at 768):

> *The United States government*, through the War Department, represented by the

[8] As will be shown, *infra*, pp. 27-29, if compensation were owed by the United States under the theory that the servitude was not properly exercised, it would be entitled to judgment over against the state Levee Board. Moreover, the timber, being on land which was overflowed "almost every year" (R. 116-117, 169-212), was located below ordinary high water mark and hence within the federal navigation servitude. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

> United States engineers, in its program of promoting flood control, navigation, and interstate commerce, *is a proper authority to exercise that servitude*, particularly where the plan and contract for the erection of the levee have been approved by the Pontchartrain levee board and the state board of engineers. [Emphasis added.]

That ruling finds support in the long history of federal improvements of the rivers in Louisiana, particularly the Mississippi.

Petitioner asserts (Pet. Br. 7) that the "minute entry [of the Board] does not purport to show that emergency action was required." There is no requirement that the minute entry show it. The official request for the right of way and the prompt granting of it by the President of the Board are sufficient to show an immediate need. As has been often held respecting a similar matter, the "mere request to the Attorney General to file a condemnation action" is "a sufficient indication of an administrative finding of the necessity for the taking." *United States* v. *30.75 Acres of Land in DuPage County, Ill.*, 76 F. Supp. 239, 245 (N. D. Ill.); *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66–67; *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78, 86 (C. A. 1), certiorari denied, 329 U. S. 718. Petitioner offered no evidence that the need was not immediate. The fact that "these two low sections" of the levee system had to be enlarged

"during the coming working season" because "[a]fter elimination of the Eudora Floodway, it was necessary to come back and enlarge the main line levees of the Mississippi River" manifests the need for prompt action (R. 223, 295, 296). And the early letting of the contracts, which petitioner criticizes (Pet. Br. 14, 26), also strongly suggests that haste was paramount.

Petitioner contends that the servitude was not validly exercised as to its property because it was not given advance notice and a hearing (Pet. Br. 20–25). That contention ignores the plain and valid distinction in Louisiana law between an appropriation and an expropriation. There is no requirement that the State of Louisiana must accord notice and a hearing to exercise a right which it has or to appropriate and use a property interest which it owns. This is not a taking from another but a use of what already belongs to the state. The procedure which due process might require for an expropriation of private property has been consistently held not to apply to the exercise of this servitude for levee purposes.[7] *Hart* v. *Board of Levee Com'rs*, 54 Fed. 559 (E. D. La.); *Peart* v. *Mecker*, 45 La.

[7] Petitioner's reliance on the statements in the dissent below (Pet. Br. 22; R. 272, footnote 11; R. 282) that the Levee Board "had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation" is, therefore, plainly misplaced.

Ann. 421, 12 So. 490. As the Louisiana court said in *Board of Com'rs of Tensas Basin Levee District* v. *Franklin*, 219 La. 859, 869–870, 54 So. 2d 123:

> Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property *without due process of law*, it has been consistently held by this court and by the Supreme Court of the United States that *such constitutional requirements relate to the right of expropriation* and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have always been reserved. [Emphasis added.]

Appeal in that case was dismissed by this Court (342 U. S. 844), on authority of *Eldridge* v. *Trezevant*, 160 U. S. 452, and *Wolfe* v. *Hurley*, 283 U. S. 801.

In *Wolfe* v. *Hurley* (46 F. 2d at p. 516), the contention was made that the "proposed action of the levee board and the agents of the government is without due process of law, and will deprive them of their property without just compensation, in violation of said amendments to the Federal Constitution; that no offer of compensation has

been made to them, nor have any proceedings for the expropriation of their lands been instituted." A three-judge district court rejected the contention on the ground that the principles of due process applicable to takings of private property did not apply to the exercise of the servitude (46 F. 2d at p. 520. See *supra*, pp. 12, 21–22).

In *Pruyn* v. *Nelson Bros.*, 180 La. 760, 157 So. 585, that principle was applied to a situation almost identical to that involved here. Following approval by the levee board and the state board of engineers of the plans submitted by the Army, the contractor entered directly upon the batture and commenced removing soil as called for by the plans. In suing for an injunction and damages, the riparian proprietor contended that the servitude "was not exercised in a legal manner or by proper authority." The court denied relief, stating (180 La. at 769): "The law does not provide that the administrative officers shall follow any particular procedure in exercising the servitude, as in appropriation [8] proceedings. The customary way is to delegate to the contractor the right to remove the soil from the batture." In *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.), the court said: "There is no formal procedure which levee districts must follow in appropriating property." While notice was given in that case, as

[8] It is plain from the context that the court intended "appropriation" in the sense of "expropriation."

petitioner points out (Pet. Br. 14), there is no indication that the holding required it and the broad sweep of the quoted language would doubtless have been qualified if some "formal procedure" were required. The fact that notice is often given does not establish that it is required.[9] In *Dickson v. Board of Com'rs of Caddo Levee District*, 210 La. 121, 132, 26 So. 2d 474, after relating the long history of the servitude and the necessity for it, the court said:

> These provisions remain in our codal law today, with the result that while in all of the remaining states of the Union lands necessary for levee purposes can only be used after expropriation and proper indemnification, *in Louisiana the state has the right to act first*, i. e., the authority to appropriate such land to a use to which it is subject under its very title, *and talk later*. [Emphasis added.]

It is plain from the above that notice and a hearing are not required before the state exercises the levee servitude. When the state desires that notice shall be given before appropriating property for levee purposes, it provides for

[9] Petitioner's statement that the Levee Board in the *Danziger* case removed the improvements "at its expense" (Pet. Br. 14) is not supported by that decision. Moreover, Article 861, Louisiana Civil Code, *infra*, p. 30, provides that improvements built on batture "may be destroyed at the expense of those who claim them."

notice by express statutory provision. *Board of Com'rs* v. *Trouille*, 212 La. 152, 31 So. 2d 700.[10]

Petitioner also contends that the servitude was not validly exercised because there was "oppression and injustice" in the fact that it was not permitted to remove its timber (Pet. Br. 12–20). It asserts that the limitation of "reasonableness of use" prohibited the removal of the timber in the most economical way. The contention lacks merit. Removal of the timber in the manner described by petitioner "would have nearly doubled" the cost of removing it (R. 185, 187, 204).[11] The "cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 554; *Old Dominion Co.* v. *United States*, 269 U. S. 55, 56. That principle has been consistently applied by the courts of Louisiana in sustaining appropriation of property for levee purposes where the use of the particular property could have been avoided, but at greater cost. *Dickson* v. *Board*

[10] For comparison, this Court has consistently held that advance notice and hearing are not required by the process prior to the exercise of the power of eminent domain. *Bragg* v. *Weaver*, 251 U. S. 57; *Ridge Co.* v. *Los Angeles*, 262 U. S. 700, 709; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349.

[11] This would have been true even if petitioner had had notice, and had then gone on the land to remove the trees. The remaining stumps would have increased the cost of the work to the Government.

of Com'rs of Caddo Levee District, 210 La. 121, 26 So. 2d 474; *Board of Com'rs. of Tensas Basin Levee District* v. *Franklin,* 219 La. 859, 54 So. 2d 125, appeal dismissed, 342 U. S. 844; *Board of Levee Com'rs* v. *Kelly,* 225 La. 411, 73 So. 2d 301.

The decisions defining due process (Pet. Br. 20–25) relied on by petitioner have no bearing on the instant case, for, as we have shown above, the principles of due process applicable to the taking of private property do not control the exercise of the servitude here involved. Accordingly, those cases are inapposite. And as we have further shown, petitioner's charge of oppression and injustice, which is based solely on the asserted unreasonableness of a use prompted by economy, is contrary to settled law on that subject. Thus, the cases cited by petitioner (Pet. Br. 13–20), touching upon "reasonableness of use" but dealing with subject matters other than cost, are not in point. Moreover, in none of the decisions relied upon by petitioner was it actually held that there had been an unreasonable use.

The decision in *Tilden* v. *United States,* 10 F. Supp. 377 (W. D. La.), relied upon in the dissent below (R. 270, 271) and cited by the district court (R. 252) as an instance wherein the United States was required to pay "the full value" under the Fifth Amendment for a right of way for a levee, is not pertinent. That case was governed by the provisions of 33 U. S. C. 702d which require

the United States to pay compensation under the Fifth Amendment for "flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River" and to take title and convey the title to the local authorities. In such circumstance, neither the Levee Board nor the United States acts under the state's servitude. Those facts are not present here. The distinction is pointed out in *Danziger* v. *United States*, 93 F. Supp. 70, 72 (E. D. La.).

In short, this case presents a situation where the land, together with its appurtenances, was subject, under a long-established doctrine coexistent with the Louisiana Constitution, to being appropriated to the public use for levee purposes without compensation. The land appropriated here has been devoted to that exact purpose and petitioner does not and cannot properly challenge that fact. Petitioner's contention that the method used to clear the land gives rise to a constitutional obligation to pay compensation is, therefore, without merit.

II

If there is liability, the United States is entitled to recover over from the Levee Board

The servitude, as shown above, was correctly exercised by the Levee Board and the rights of way donated to the United States in accordance with the provisions of state and federal law.

Therefore, neither the Levee Board nor the United States is liable to pay compensation. However, should the Court be of the opinion that compensation is owed by the United States under any theory, we submit that it is entitled to judgment over against the Levee Board by virtue of the statutes and transactions set out, *supra*, pp. 16–18.

The district court held (R. 254) that the United States, rather than the Levee Board, should pay the award because Section 3 of the Federal Flood Control Act as amended (33 U. S. C. 702a–12 (d)), (Pet. Br. App. 30) provides that: "The Chief of Engineers, with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees." But the project here is not the construction of a setback levee. It is an enlargement of an existing levee (R. 222–223). Accordingly, 33 U. S. C. 702a–12 (d) has no application to this project and such has been the administrative construction (see footnote 3, p. 16, *supra*). And under Section 702a–12 (d), the district court lacked authority to require the United States to pay, in the absence of an administrative finding of reasonableness.

The right of way is governed by 33 U. S. C. 702c (Pet. Br. App. 30–31), which requires that "the States or levee districts provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River." Cf. 33 U. S. C. 701c, 702a–9, 702a–12c. Hence, the Levee Board was chargeable with that duty, and was answerable to the United States therefor. However, since the court below did not pass upon the question of the liability of the Levee Board to the United States, it is submitted, in the event this Court finds the United States liable, that the case should be remanded to the court below, where all parties are present, for a determination of that question.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Article 465 of the Louisiana Civil Code provides:

> *Crops, fruits and trees.*—Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached.
>
> As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables.
>
> If a part only of the crop be cut down, that part only is movable.

Article 861 of the Louisiana Civil Code provides:

> *Works in public places—Destruction.*—Works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which obstruct or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them, at the instance of the corporation of the place, or of any individual of full age residing in the place where they are situated.
>
> And the owner of these works cannot prevent their being destroyed under pretext of any prescription or possession, even immemorial, which he may have had of it, if it be proved that at the time these works were constructed, the soil on which they are built was public, and has not ceased to be so since.

Act No. 75, Acts of 1940, La. Rev. Stats. 52:2, provides:

Donations to United States for certain purposes; officers making donations

The state or any state agency or subdivision may donate or convey to the United States any lands, movable or immovable property, rights of way, or servitudes which they may own or acquire, for use by the United States in connection with:

(1) The improvement and maintenance of the navigation of natural waterways;

(2) The construction, improvement, and maintenance of artificial navigable waterways, river and harbor works;

(3) Flood control works;

(4) Airports, flying fields, landing fields, parks, forest preserves, canals, irrigation districts, hospitals, agricultural experiment and research stations, military posts and for any military purposes.

In the case of property owned by Louisiana or any state branch or agency, the transfer or conveyance shall be performed by the governor with the consent and approval of the lieutenant governor or the attorney general. The commission council or other governing body of a municipality shall transfer or convey property owned by a municipality. In the case of a parish the parish governing authority shall transfer or convey the property and in the case of any other subdivision of the state the governing body shall transfer the property.

Act No. 76, Acts of 1938, La. Gen. Stats. 6809.3, provides:

Declaration of policy.—All levee districts in the state of Louisiana heretofore or

hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power.